United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1339

To be argued by
JED S. RAKOFF

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1339

UNITED STATES OF AMERICA,
Appellee,

—v.—

MICHAEL S. GARDNER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Michael S. Gardner appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 7, 1976, following a month-long trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment 76 Cr. 21, filed January 9, 1976, charged the defendant Gardner, in 13 counts, with devising and executing a series of interrelated fraudulent schemes between 1973 and 1976, in violation of the federal laws prohibiting mail fraud, wire fraud, travel fraud, fraudulent use of fictitious names and titles, and aiding and abetting such frauds (respectively, Sections 1341, 1343,

2314, 1342 and 2 of Title 18, United States Code).* An "Introduction" to the Indictment further grouped these schemes into three substantive categories:

First, there were the "advance fee" schemes (Counts 1-4 and 7-12), where Gardner, masquerading as a substantial international financier, falsely promised to obtain for his victims large and rapid financing that they sorely needed, in exchange for advance fees and expenses, which Gardner immediately diverted to his personal use. Next, there were the "fraudulent check" schemes (Counts 5 and 6), where Gardner forged Canadian checks in nonexistent accounts and had co-defendant Braunig deposit them in New York, taking advantage of the delay in check-clearing across an international border to get credit on the checks. Finally, there were the "charge account" schemes (Count 13), where Gardner and Braunig, employing some of the fictitious names and titles developed in connection with the other schemes, opened credit accounts and ran up large bills, which in material measure they never intended to pay and never did pay.

Trial against Gardner commenced on April 26, 1976, and on May 26, 1976, the jury returned a verdict against Gardner of guilty on all 13 counts. On July 7, 1976,

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* The indictment also named two co-defendants, Susan M. Braunig and Sy Yoakum Guthrie III, who were also charged with making false declarations to the Grand Jury in violation of Title 18, United States Code, Section 1623. Prior to trial, Braunig became a fugitive, and her trial on all charges was severed. Following her arrest in Montreal and her conviction there on eighteen check-kiting charges (for which she served a brief prison term), she was finally tried here on Counts 5, 6, 7, 8, 13 and 15 of this indictment and convicted of all but counts 7 and 8. Guthrie was tried with Gardner on six fraud counts (7-12) and was acquitted. The false declarations count against him was severed, and trial of this count is scheduled for later this fall. He is presently at large pending appeal of a recent federal conviction in California for fraud.

Judge Pierce, taking note of the "egregious" nature of Gardner's misconduct (Snt. Tr. 29),* sentenced Gardner to a term of five years imprisonment on each of Counts One through Twelve and one year imprisonment on Count 13, the sentence on each of the counts to run concurrently with each other and with the two-year sentence Gardner had just begun serving for the second of his two prior federal convictions.

Statement of Facts

Government's Case

The Government's case, consisting of 37 witnesses and several hundred exhibits, firmly established that Gardner had committed each and every one of the frauds charged in the 13 counts of the Indictment. Nonetheless, on this appeal, Gardner challenges the sufficiency of the evidence. Consequently, it is necessary to recapitulate here in some detail at least some of the highlights of the Government's proof as to these frauds.

A. The White Holdings Fraud (Counts 1 and 4).**

The first fraud charged in the Indictment was an "advance fee" scheme devised by Gardner in early 1974.

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* Abbreviations used in this brief are as follows: "Tr." refers to the transcript of the trial. "App. Br." refers to appellant's brief. "Snt. Tr." refers to the transcript of the sentencing. "GX" refers to Government exhibits at trial. "DX" refers to defendant Gardner's exhibits at trial. "A" refers to appellant's Appendix.

** The Government's direct case on the White Holdings fraud consisted mainly of the testimony of L. Ross Allen (Tr. 89-403), Vincent J. ("Jerry") Kirby (Tr. 492-564 and 581-711), Laurence T. Clements (Tr. 723-766), Romayne Sims (Tr. 1119-1151), Ronnie Sue Gertner (Tr. 413-421), Francis W. Palmieri (Tr. 576-580), Melvin M. Morgan (Tr. 787-841), and the exhibits accompanying their testimony.

It depended on his creating the illusion of being a prosperous financier with access to immediately forthcoming funding, whereas in fact he was without funds, heavily in debt, and incapable of raising such funds.*

Early in 1974, Gardner was introduced to Arthur White, who, under the name of White Holdings Ltd., owned a number of tourist facilities in the city of Niagara Falls, Ontario, Canada. White had recently borrowed heavily and placed first and second mortgages on everything he owned in order to acquire four hotels from the Sheraton hotel chain (Tr. 90-92). Now, during the off-season, he found himself unable to get further financing from the local banks. (Tr. 93-94).

Gardner, learning all this, arranged a meeting with White in Niagara Falls on Sunday, February 3, 1974. Accompanied there by what Gardner described as his group of greatly experienced experts in European financing—Jerry Kirby, Susan Braunig, Laurence Clements, and Frederick Riley (Tr. 95-96; 258ff.)—Gardner then and there drafted and presented to White a proposal (GX 48), by which Gardner would purchase 40 per cent of White Holdings for $15 million, which Gardner would in turn raise by selling in Europe stock in an off-shore corporation into which Gardner would pour his 40 per cent ownership in White Holdings. Gardner, falsely claiming that he had raised similar financing in Europe on prior occasions, promised to raise the money "very, very quickly" (Tr. 96). The only catch was that White had to advance to Gardner a fully refundable $100,000 (the "advance fee") to cover the necessary expenses of getting the project started (GX 48).

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* For all Gardner's representations, there was no evidence that he ever raised any financing for anyone, anywhere, at any time. Indeed, his long-time associate, Jerry Kirby, admitted on the stand that of all the many deals he and Gardner worked on over the years, *not one* was ever successfully completed (Tr. 697).

White was attracted to the proposal, but protested over having to advance $100,000 (*e.g.*, Tr. 96-97, 101-102). In response, Gardner steadily reduced the size of the advance fee, from $100,000 (GX 48), to $75,000 (GX 3), to $40,000 (GX 8), and finally, in the final agreement executed February 28 (GX 13), to $25,000, representing that he (Gardner) would bear the additional start-up expenses and that, if he failed to perform, he would fully refund White's $25,000 (GX 8, 13; Tr. 190ff.).

The actual truth, hidden from White, was that Gardner could not possibly bear any part of the expenses, since he was flat broke. Indeed, in a sworn deposition (GX 263) given in New York just a few days later, on March 8, 1974, Gardner testified that he was presently unemployed and heavily in debt, with assets and earnings of approximately thirty to forty thousand dollars and outstanding judgments and liabilities of "about a quarter million dollars," and that he was contemplating an assignment for the benefit of creditors (GX 263; Tr. 770, 772-4, 781, 784-6, 795 and *passim*). Also, Kirby testified that Gardner had so little money at this time that Gardner had been forced to vacate his prior business office because he could not pay the rent and was reduced to borrowing his rent money from his mother (Tr. 505-07).*

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* Gardner also cleverly stymied all attempts by White and White's solicitor, L. Ross Allen, to ascertain this information for themselves. Thus, instead of using his real name, Gardner assumed the name of "S. Michael Gardner," thereby assuring that the independent check that Allen ran on Gardner's credit rating would turn up blank (Tr. 113). And when Allen asked Gardner directly to supply credit references (Tr. 113 ff.), Gardner wrote back a letter (GX 5), on the letterhead of "S. Michael Gardner" and typed by his "secretary" Ms. Braunig, stating that:

> "As you know, the European attitude towards privacy makes it extremely difficult to obtain credit references,

[Footnote continued on following page]

When, after much negotiation, Gardner, to substantiate his claim that he personally could and would cover the expenses of the project above White's $25,000, produced what purported to be his (Gardner's) own check for $25,000, White agreed to go forward (Tr. 148 ff). On February 18, 1974, he gave Gardner a check, certified at Gardner's request by the Bank of Montreal, for $25,000 (Canadian), which Gardner thereafter represented had been deposited along with Gardner's own $25,000 check in an account from which the expenses of the project would be covered and for which Gardner would forward confirmation (Tr. 152, 181, GX 13).

This was all a sham. Gardner never deposited $25,000 of his own; indeed, as indicated above, he never had $25,000 to put up. Nor did he ever provide White with confirmation of the deposit (Tr. 181) or any accounting of how the money had been spent (Tr. 244); indeed, as he admitted, he never kept any business records at all except "in my own mind" (Tr. 152, 791, 2954). Gardner immediately took White's $25,000 (Canadian) check (GX 1) to New York City and, the very next day, with the aid of Susan Braunig, exchanged it at the Bank of Montreal branch in New York for two bank checks. Through transactions not necessary to detail here, these funds were immediately diverted

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ect [sic]. To my people, with whim [sic] you have met, privacy is a tradition, and credit standing a most personal matter."

In place of credit references, Gardner offered brief background descriptions of his group of "experts," in each of which he flagrantly—and even whimsically—misrepresented the true backgrounds of his so-called advisers, *e.g.*, "Although Mr. [Frederick] Riley's relationship with the Baron De Rothchild [sic] and the Rothchild [sic] banking consortium is a well known fact, Mr. Riley declines to submit any reference, and will enter the picture only as my representative. . . ."

through the Deak Bank in upstate New York to the private uses of Gardner, Braunig and their confederates, such as their home apartment rents (see, *e.g.*, GX 238, Tr. 724, 738, 2920). As soon as they received their "cuts", Clements and Riley entirely disappeared from the "project" without doing any work. (GX 5; Tr. 263-64, 381-82, 730-34, 739).

Having defrauded White of his $25,000, Gardner never went forward with the European offering. Indeed, he did nothing further beyond those superficial steps necessary to maintain the appearance that he was doing something—partly in order to lull White into temporary complacency, but more, it can be inferred, so that he could induce White's solicitor, L. Ross Allen, to become Gardner's next victim and advance him still further funds; and also, of course, to create his defense when the "project" eventually came to naught. Moreover, as the proof at trial showed, even the few steps that were taken in seeming furtherance of the White project were either in reality not used for the White project at all, or else were primarily the work of the White organization itself, not Gardner.*

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* The first such step was to set up the two corporations set forth in the final arrangements as being necessary to the European offering: to wit, an Ontario corporation named Ekalb Investments, Inc. and a Panamanian Corporation named Niagara Falls Corporation. However, having been set up, neither corporation was ever used on behalf of the White Holdings project (see Tr. 273-75); rather, as set forth below, they were used as "fronts" for the commission of other schemes.

The second such step was the preparation of a brochure describing White's properties (GX 14), supposedly to be part of the prospectus to be used in the European offering. The actual preparation of the brochure (for which Gardner was supposed to pay, but did not (Tr. 705)) was mainly the work of White's own son Bill, two other executives of White Holdings, and Kirby, who stayed two weeks in Niagara Falls—entirely at White's expense—in order to carry out this mighty task (Tr. 152-53, 294, 299-304, 515-17, 544ff., 703-04; GX 211D).

[Footnote continued on following page]

When by early April, neither White nor Allen could be induced to "advance" any further money, Gardner suddenly became difficult to reach. Allen's letters and telephone messages to Gardner's office went unanswered (*e.g.*, Tr. 233-236), and May 30—the date on which Gardner's first payment of $400,000 to White was due (GX 13)—came and went without anything to show but words. When, by August, Allen realized that he and White had been swindled and sent Gardner a demand for repayment, Gardner falsely responded that "I have financed the expenses on White deal and have worked it out completely" (GX 37). But the truth was that the project had never begun—and Gardner, at trial, was unable to offer any evidence to the contrary. He had simply taken White's $25,000 for himself; he never returned or properly used a penny of it (Tr. 158, 243; GX 238).

B. The Porklean Farms Fraud (Counts 2, 3, 4)*

Gardner's next advance fee fraud was perpetrated at the expense of Arthur White's solicitor, Ross Allen, and

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The final such step was for Kirby, in March, to go to Europe (on a ticket paid for by White—Tr. 305, 547-49), allegedly to make preliminary arrangements for the European offering by registering the Panamanian company and having the brochure printed. This was entirely a sham; Gardner not only failed to send Kirby any of the money needed for the printing (having spent all of White's advance fee on himself) but even failed to send him the corporate documents showing the formation of the Panamanian corporation—even though in fact it had been set up (Tr. 551-53-559, 600-01, 704-06; GX 135). And Kirby's bills in Europe, which Gardner was supposed to pay, wound up being paid by White's solicitor, Allen (Tr. 190-194, 382, 555-58, 704-06).

* The Government's direct case on the Porklean Farms fraud consisted mainly of the testimony of the same six witnesses who testified respecting the White Holdings fraud (see footnote at page three, *supra*), together with the exhibits accompanying their testimony.

grew directly out of Gardner's success in defrauding White. Specifically, shortly after pocketing White's $25,000 advance fee, Gardner approached Allen about arranging a similar European financing for Porklean Farms, Ltd., a hog-breeding operation in which Allen was a principal and which was experiencing financial difficulties at this time (Tr. 163, 384). Gardner represented that he could arrange for a West German stock offering by which $6 million (U.S.) could be raised "at once" for Porklean that would both ease its "cash-poor" status and also enable it to expand into foreign markets. Literally overnight, Gardner hand-drafted an agreement (GX 17), which, after some further negotiations and changes, was typed and then executed by Allen and "S. Michael Gardner" in early March (GX 19; Tr. 163ff.).

Under the agreement, while Gardner was responsible for all the other expenses, Porklean was responsible "to a maximum of Fifteen Thousand ($15,000.00) Dollars for the fees and expenses for the setting up of the German corporation . . ." (GX 19; Tr. 371-2). Allen did not pay this $15,000 when he signed the agreement on March 1, for Porklean did not have sufficient funds available (Tr. 167, 384, 362, and *passim*). But on March 5, Gardner called Allen to remind him to pay (Tr. 167), and this was followed on March 7 by a letter from Gardner (GX 20) on the letterhead of "Penquin [sic] Products Company" stating:

> "Speaking Penquin to Porklean, Ross, I'd say say things are proceeding rather well. We are rewriting some of your material and should have everything on the road by some time next week."

The letter was signed: "Penquin Products Company — S. Michael Gardner, President."

In reality, this was all a sham. As previously indicated, Gardner had neither the facilities nor the finan-

cial wherewithal to carry out this kind of project. Indeed, the above letter was written just one day prior to his giving the sworn deposition mentioned earlier, in which he confessed to being hopelessly in debt and without assets or resources. And as for Penquin Products, Gardner later admitted on cross-examination that it was simply a partnership (with himself and Braunig as partners) set up to market "complimentary dinner club books," which never got off the ground (Tr. 2519-25, 2873, 3000ff., and *passim*). But Allen, believing Gardner to be the experienced and financially capable expert in raising European capital that he had represented, scraped together what monies he could and sent Gardner three checks for $5,000 each, dated March 10, March 20, and March 30, so that he would have sufficient time to cover them (Tr. 167ff.). Gardner immediately deposited the first $5,000 check (GX 2) in his account at the Deak Bank in upstate New York, where, following a delay in sending the check to Canada, it cleared (Tr. 169, 1144ff.; GX 238).* As with White's $25,000, Gardner then immediately converted Allen's $5,000 to his own use. Not one penny of Allen's $5,000 was ever spent on what the agreement (GX 19) called for it to be spent on—"the fees

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* One potent proof of Gardner's fraudulent intent was the speed with which he converted the advance fees to his own use. In the case of White's $25,000, which was a certified check, he was able to exchange it the next day for two bank checks, which he then deposited in his personal account. The first Allen check, not being certified, could not be converted quite so quickly. But a few days after it was deposited, Braunig called the Deak Bank on Gardner's behalf, and, upon learning that the Allen check had not yet been credited because of the delay in clearing checks through Canada (see Section "D" below), Braunig induced Mrs. Sims of the Deak Bank to call the Canadian bank directly to speed the collection process. Later, Gardner sent Mrs. Sims a thank you letter and a bouquet of flowers for these and other such services in speeding credit to him. (Tr. 1144-1150; GX 238).

and expenses for the setting up of the German corporation"—and indeed no such corporation was ever set up.*

After Gardner had deposited Allen's second $5,000 check (GX 22), dated March 20, but before it had cleared, one of White's agents, Joseph Fuger, told Allen that he had learned that Gardner was in serious trouble with the law as a result of recent criminal convictions for stock fraud and dealing in stolen securities. Allen immediately stopped payment on the remaining two checks to Gardner (Tr. 177). He then spoke with Gardner, who totally denied his prior convictions and said it "must be another Michael Gardner" (Tr. 180, 182, 377)—a blatant falsehood, but not an unconvincing one in light of the commonness of the name "Gardner" and the fact that Gardner in dealing with Allen had always used the name "S. Michael Gardner" instead of his actual name under which he had been convicted (GX 419, 420).

After more conversations in which Gardner further assuaged Allen's fears—and, with Kirby's help, induced Allen to release a further $5,000—Gardner became impossible to reach, and finally Allen, on August 8, 1974, wrote Gardner, terminating their agreement and demanding a refund (Tr. 186-197, 232-39; GX 33-A). Gardner responded that he was working things out and would contact White and Allen soon; he never did, and no refund was ever forthcoming (Tr. 239-44).

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* As summarized by the Government on summation (GX 434 and 436 for identification), the Deak Bank checks and records showed that from the proceeds of White's and Allen's advance fees, Gardner spent 81% on expenses that were personal or, at least, wholly unrelated to the White and Allen projects, such as cash for his wife, his mistress, and his mother, and other personal expenses; another 12½% went for the personal expenses of his confederates; 1½% went for miscellaneous unspecified expenses; and only 5% went for expenses that could even arguably have been said to have been related to the White and Allen ventures.

C. The Charge Accounts Fraud (Count 13).*

To maintain his expensive "life-style" (which, the proof showed, included separate East Side apartments for his wife and his mistress, a large Fifth Avenue office, a chauffeured limousine, frequent dining at chic restaurants, etc.), Gardner, who had no legitimate occupation, relied not only on the proceeds of his advance fee and bank frauds but also on the fraudulent obtaining of credit. By 1973, with numerous default judgments pending against him, Gardner had no reasonable expectation of obtaining credit, especially under his own true name of Michael S. Gardner. Consequently, after forming his liaison with Ms. Braunig in late 1972, Gardner and Braunig entered into a scheme whereby Braunig obtained charge accounts, credit cards, and the like using her own name but a wide variety of fictitious titles and false employment information drawn from the various corporate fronts that Gardner had developed in connection with his other frauds. After establishing a large number of such accounts, Braunig, by pretending to have married a rich executive named "S. Michael Gardner," induced the companies to change her accounts to joint ones in the common fictitious name of "S. M. Gardner" (i.e. "S. Michael Gardner" and "Susan M. Gardner") and, in many cases, to increase their credit limits. She and Gardner then ran up, in 1974 and 1975, thousands of dollars in unpaid charges, made use of their false names to stave off collection, and, when

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* The Government's direct case on the charge accounts fraud consisted mainly of the testimony of Melvin Morgan (Tr. 797-840), Marie Sansone (Tr. 849-868), Peter Altmann (Tr. 870-881), Maureen Walsh (Tr. 883-892), Harry McBeth (Tr. 893-931), Fortunee Naim (Tr. 933-1009) Deborah Menendez (Tr. 1328-65), Joel Viders (Tr. 1404-1414), Neil Cirranello (Tr. 1414-1423), Steven Smiler (Tr. 1424-42), Frank Finnigan (Tr. 1511-13, 1530-154i, 1642-44), and Karen Schiller (Tr. 1542-55), together with the exhibits accompanying their testimony.

all else failed, simply defaulted, leaving it to the companies to discover that the credit information on which the companies had relied in extending credit to "S. M. Gardner" was entirely false.

The Government introduced numerous examples of such fraudulently obtained charge accounts, any one of which was sufficient to support conviction on Count Thirteen, which charged Gardner and Braunig with using false and assumed names and titles for the purpose of carrying on a fraudulent scheme to obtain credit, in violation of 18 U.S.C. §§ 1342 and 2.* The example of the Master Charge account (GX 205) is illustrative. Braunig first applied for a Master Charge account in February, 1973 under her real name and home address, but falsely stating among other things that she had been employed for the past four years at "Worldwide Securities Ltd.," a "brokerage" business where she was now "Adm. Asst. to President" (employee number "04510") at an annual salary of "$10,400," plus additional income from "stock portfolio" and "commodities contracts."**

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* The primary examples were charge accounts with Altman's (GX 226), Bank Americard (GX 235), Bloomingdale's (GX 227), Bonwit Teller (GX 222), Lane Bryant (GX 233), Master Charge (GX 205), Saks Fifth Avenue (GX 228) and Tiffany's (GX 234), and there were others as well (including even the telephone company).

** In actual fact, "Worldwide Securities" was merely the front behind which Gardner and Braunig (there signing as "corporate secretary") had committed their fraud on Underwriters' Trust a few months earlier (see Point III, *infra*). Far from working there for four years, Braunig had only met Gardner in 1972 (Tr. 2290 ff., 2825 ff., 2999), long after he had been barred from the brokerage business (Tr. 2999). There were no employee numbers at "Worldwide Securities," which consisted entirely of Gardner, Braunig, and an occasional part-time secretary (Tr. 1545-48, 1555), and Gardner did not pay Braunig a regular salary (Tr. 1547).

[Footnote continued on following page]

Having opened the account, Braunig, in line with the pattern on all her accounts, further lulled Master Charge into believing she was a good credit risk by, over the first few months of the account, limiting her charges and making timely payments. Then, in February, 1974, she took the next step in the scheme by sending Master Charge an application to change her account name to "Susan M. Gardner" and issue two account cards in the joint name "S. M. Gardner." In this application, in addition to assuming the false name,* she falsely stated among other things that she was now employed, at an annual salary of "$16,000," at "Penquin Products Company," a "Conglomerate" that had taken over Worldwide Securities, and was now "married" to "S. Michael Gardner," for whom she wanted the second credit card.** As soon as the card was issued, Gardner began using it.

Additionally, the Master Charge records indicate that when their office called the phone number Braunig had given for Worldwide Securities, a "Mrs. Seidenberg" confirmed Braunig's employment information. In actual fact, the real Karen Seidenberg, a temporary secretary, had left Gardner's employ months earlier (Tr. 1546); Braunig had simply appropriated her name.

* Gardner's "Statement of the Case" to this Court states (without any citation to the record) that Braunig's changing of her accounts to the name "Gardner" partly "reflected a change of name she effected with Actor's Equity (she was also an actress) . . . ." (App. Br. 12). There is not a scintilla of evidence in this case to support this false assertion. On the contrary, its "source" (if any) is Braunig's testimony to the Grand Jury, as set forth in Count 15 of the Indictment against her charging her with perjuring herself before the Grand Jury by telling them this flagrant falsehood. On September 27, 1976, a jury in the Southern District of New York convicted Braunig of this very Count (among others).

** In actuality, she was not married to Gardner or anyone else (Tr. 3002 and *passim*), and Penquin Products, as noted earlier, was simply a defunct partnership that she and Gardner had set up purportedly to market complimentary dinner club coupons, and that had never gotten off the ground.

Finally, on May 1, 1974, Braunig applied for an increased credit limit for "S. M. Gardner," stating, "[w]ant to use card for travel expenses now as well (business) company reimburses expenses." On this application under the name of employer or business, Braunig put "Ekalb Investments Inc.," the "shell" Gardner had set up, but never used, in connection with the White Holdings project, *supra*. Braunig falsely stated that Ekalb was a "Conglomerate," of which her husband was President at a salary of "$100,000" and of which she was "Corporate Secretary & Mgr." at a salary of "$16,500." *

In early July, Master Charge approved the increased credit limit. As reflected in the voluminous Master Charge records (GX 205), Braunig, a few days later, called Master Charge and falsely claimed that her credit card had been lost or stolen. She requested Master Charge to issue two new cards, under a new account number, to "S. M. Gardner", and this was done.

Armed now with two "S. M. Gardner" Master Charge cards, Gardner immediately flew to Europe, where during August, 1974, he ran up several thousand dollars of airplane, hotel, car-rental, and similar expenses, which he charged to one or the other of his Master Charge cards. On a smaller scale, Braunig, who remained in New York, did the same with her two cards. In this fashion, the two of them, in a few

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* On cross-examination, Gardner claimed he "might" have made a hundred thousand dollars that year, although he admitted to not having filed any income tax return reflecting this (Tr. 3002-03).

months, ran up approximately $3,500 in charges, $3,300 of which they never paid.*

D. The Barclay's Bank Fraud (Counts 5 and 6).**

Gardner's next, and perhaps most blatant, scheme was a forged and fraudulent check scheme committed at the expense of Barclay's Bank of New York. In June, 1974, Barclay's opened a new branch in mid-town New York and offered free checking accounts to new customers (Tr. 935). In short order, Gardner and Braunig opened three accounts at the branch: one in her name, one under the fictitious name "S. M. Gardner," and one under the name of their corporate shell "Ekalb Investments, Inc.," which they represented as being an "investment" company presided over by "S. Michael Gardner." (Tr. 936-943; GX 265-268).

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* When no substantial payments were made into their account, it was referred, in October, 1974, to the Master Charge credit department. In response to its inquiries, Braunig and Gardner, over the next few months, offered, both orally and in writing, a long series of fabrications designed to mislead Master Charge.

For example, Braunig, using the name "Susan M. Gardner" and the letterhead of "S. Michael Gardner," wrote in her letter of January 15, 1975 that: "As for the Hertz rent-a-car charge from Frankfurt, Germany; Mr. Gardner does not have an account with them, has never placed his signature on file with them and certainly did not rent a car from them ($108.25)." Master Charge's customer service manager duly wrote to Hertz in Germany and received back a photocopy of the relevant car rental contract and voucher, very clearly showing Gardner's distinctive signature at the bottom (GX 205).

** In proving this fraud, the Government's direct case consisted mainly of the testimony of Fortunee Naim (Tr. 933-1009), Leon Wiesersak (Tr. 1064-1078), Joseph Conklin (Tr. 1091-1118), Ivan Svendsen (Tr. 1185-1210), Donald Stangel (Tr. 1998-2033), and the exhibits accompanying their testimony.

Over the next few months, Gardner "tested the waters" by drawing a number of insufficient checks on the "Ekalb" and the "S. M. Gardner" accounts. As a result, he quickly discovered that Barclay's was lax and error-prone in its check-clearing procedures, particularly where foreign transactions were involved; and he took advantage of this to fraudulently obtain monies through both of these accounts.*

With this as background, Gardner, in December, 1974, turned his attention to the remaining Barclay's account, in Ms. Braunig's name.

Gardner now proceeded to make out two blank checks of the Metropolitan Trust Company (a bank-like institution in Canada), for just under $5,000 apiece, to the order

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* For example, in August, 1974, having $194 in his Ekalb account, Gardner made out an Ekalb check for $22,860 to Hermance Investments in Switzerland. The check "bounced." Unfazed, Gardner, in September, 1974, with the same low balance in his Ekalb account, made out another check to Hermance Investments, this one for $23,437. Through an error at Barclay's, this check initially cleared, and Barclay's appeared to have lost over $23,000. Gardner, for his part, disclaimed any personal liability, saying it involved only the (judgment-proof) corporation, Ekalb. Fortunately for Barclay's, before the money had reached "Hermance Investments," Barclay's was able to stop the transfer and recoup the money from the transferring Swiss Bank, Credit Suisse (Tr. 958-965, GX 274).

Later in September, Gardner drew a certified check for $5,000 on his S.M. Gardner account at a time when he had a sufficient balance to cover it. But when, upon receiving his next statement, he found that, again through some bank error, this withdrawal of $5,000 had not been debited to the S.M. Gardner account, he immediately drew out the balance of the artificially inflated account, thus defrauding the bank of $5,000. When, in November, the bank discovered the error and tried to contact "S.M. Gardner," he proved unreachable. (Tr. 965-67, GX 270, 273).

of Susan M. Braunig, using fictitious account numbers and names. On the first check (GX 56A), dated December 3, 1974, he forged the name "John Robert Barry" and on the second check (GX 56B), dated December 4, 1974, he forged the name "David Barrett." * Braunig then deposited these fraudulent checks, on consecutive days, into her Barclay's account, the prior balance of which was near zero (Tr. 968-70, GX 56A & B, 269, 272).

From his prior experience with his own Metro Trust accounts (GX 244-46, GX 57) and from the delays encountered in clearing Allen's Canadian checks through the Deak Bank (*supra*), and even more from Gardner's own very extensive knowledge of check-clearing procedures of various banks (*infra*), Gardner knew that there would be a considerable delay while these checks cleared through the international mails between New York and Canada. He knew further that Barclay's was lax and error-prone, and if it erroneously credited, or could be induced to credit, the proceeds of the checks any time during the lengthy clearing-period delay, Gardner could reap the fruits of this fraud.

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* Although Gardner denied signing the checks, the proof of his forging—the heart of the fraud—was overwhelming, and his Brief does not challenge it on appeal. Among much else, there was the testimony of a handwriting expert that it was "highly probable" that the forged signatures were Gardner's writing (Tr. 2020); the testimony of Gardner's confederate, Jerry Kirby, that they were Gardner's writing (Tr. 526); the proof of Gardner's forging signatures in connection with some of the other frauds in this case (e.g., Tr. 213, 537-44, 586-89, 742-45); the proof of Gardner's access to blank Metro Trust checks (Tr. 523-26, 1187-1203); and the fraudulence of the accounts, the obvious phoniness of the names, and other such indicia of fraud that Gardner, who with Braunig was the beneficiary of the proceeds of the checks, was unable to adequately account for (*e.g.* Tr. 2753-60, 2778-92; and see Tr. 3242-46, 3373-75).

In particular, there was ample proof that Gardner knew that Barclay's Bank, like other New York Banks, had a "three day rule" and a "seven day rule" (Tr. 974ff., 3103-10; GX 409). When a check drawn on a local New York bank was deposited into Barclay's Bank of New York, Barclay's would automatically credit the proceeds after three days unless the check had been reported bad. Likewise, if the check was drawn on an out-of-town (but not foreign) bank, Barclay's would automatically credit the proceeds after seven days unless the check had been reported bad. In the case of foreign (including Canadian) checks, however, there was no automatic rule, and the bank was not supposed to credit the proceeds until receiving actual word of clearing from the foreign bank. But Gardner knew that if the bank made one of its frequent errors and credited the checks under either of the automatic rules, there would be ample opportunity to realize the fraud.

Accordingly, on December 6, just 3 business days after the deposit of the first forged check, Braunig went to Barclay's and tried, with two tellers, to cash a check for $3,600 against the proceeds of the first forged check. No error had yet been made, however, nor was she able to induce one on this occasion (Tr. 971-73; GX 272-E). So Braunig waited again, until seven days had passed, and on December 10 tried to cash a $1250 check at another Barclay's branch (Tr. 973, GX 269A); but Barclay's computes its "seven day rule" by business days, so once again she was unsuccessful.

On December 12—seven business days after deposit of the first forged check—Braunig tried a third time, this time with a small $75 check (Tr. 975; GX 269, 272). This time she was successful in inducing an error: a bank employee treated the deposits under the

"seven day rule" and credited them to Braunig's account (Tr. 974-75).

Within five days, Braunig proceeded to withdraw the entire proceeds (other than $10.80); in turn, she converted some of the proceeds to cash, but deposited most of them into Gardner's own account at the Amalgamated Bank, from where he spent it on personal uses (Tr. 975; GX 410(1)) and also on paying the fee of the attorney who represented him when Barclay's thereafter sued him (GX 503). Meanwhile, the forged Canadian checks wound their way through the mails, and in January and February, Barclay's received word that they had failed to clear. By then it was too late: Gardner and Braunig were $10,000 richer, Barclay's $10,000 poorer.

E. The Fun Tyme Fraud (Counts 7 and 8)*

Gardner's next scheme was another "advance fee" fraud.

Fun Tyme Packages, Inc., was a wholesale travel agency in Brooklyn, specializing in "package tours" to the Caribbean (Tr. 1212-1215). The Caribbean hotel and tourist agencies with whom Fun Tyme booked these tours in advance required that Fun Tyme guarantee the bookings by providing *guaranteed* letters-of-credit ("L/C's") from established banks, who, in turn, required that such guaranteed L/C's (which were readily negotiable) be collateralized dollar-for-dollar (Tr. 1215ff, 1373ff). In late 1974, Fun Tyme needed $500,000 in guar

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* The Government's direct case on the Fun Tyme fraud consisted mainly of the testimony of Robert Van Marx (Tr. 421-478), Scott Grody (Tr. 1210-1328), Deborah Menendez (Tr. 1328-65), Mark Parker (Tr. 1365-99, 1454-1510), Jack Gardner (Tr. 1558-1576), Sara Giaimo (Tr. 1650-75), and the exhibits accompanying their testimony.

anteed L/C's to get through the 1975 winter season, but it had only $200,000 in cash collateral available for this purpose (Tr. 1217-19). The banks that Fun Tyme approached could not be induced to change their dollar-for-dollar policy (Tr. 1218-20). By January, Fun Tyme found itself in a desperate predicament: if they failed to produce the L/C's soon, they would no longer be approved by the Caribbean agencies and would be forced out of business (Tr. 1219).

At this point, with its "creditors . . . pressing very badly" (Tr. 1390), Fun Tyme was introduced through a purported "finder", Sy Guthrie, to Gardner (Tr. 1381-83). Gardner represented that he had connections with a Swiss bank that he felt he could supply the necessary L/C's in just 10 days. Moreover, citing what he said was a section of the "international banking code," Gardner stated that the Swiss bank could supply $500,000 in L/C's even if Fun Tyme could put up only $200,000 in collateral. (Tr. 1384ff; GX 96). Gardner stated that his fee for this rapid service would be $25,000, of which $7,500 had to be paid in advance; but if the deal did not go through, it would be fully refunded (Tr. 1385).

On January 15, a written agreement drafted by Gardner and embodying these terms was entered into by Fun Tyme, "S.M. Gardner, as agent" (without specifying as agent for whom or what), and "Sy Guthrie (Finder)".*

* The agreement (GX 96) provided in its first clause that:

"GARDNER agrees to arrange for FUN TYME within ten (10) days of the signing of this agreement twelve (12) letters of credit for a period of one (1) year with an aggregate value of $500,000 U.S."

It went on to provide that these were to be "clean," "irrevocable," "guarantees," "drawn on a qualified Swiss banking institution," and that Fun Tyme was required to post only $200,000 in collateral. Finally, it provided that Fun Tyme was to pay a fee of $25,000, of which $7,500 was to be paid in advance "as a binder" that would be fully refunded if Gardner failed to comply.

Later that same day, Fun Tyme delivered a check for $7,500 to Gardner's office, and it was deposited the next day in a joint "S.M. Gardner" account at Manufacturers Hanover (GX 97, 204; Tr. 1388). Gardner then immediately drew out the proceeds and spent them on back bills and personal expenses and also on a $1,000 check to the Hotel Blackstone which was credited to Guthrie's back-rent bill there (GX 204, 415-17; Tr. 1563ff.).

Gardner's agreement was a total sham. Gardner had never succeeded in raising L/C's in the past (or any other financing for that matter); he had made no contacts with any Swiss bank about getting these L/C's;* and he had no basis whatever for believing, let alone promising, either that a Swiss bank would accept only the 40% collateral or that the L/C's could be issued in ten days.

The ten days passed, during which the full extent of Gardner's "efforts" to get the L/C's was telexed inquiries to his confederate in Geneva, Assen Ivanoff, who, at best, was not a banker himself but simply a "good customer" of a small, unstable, and dubious Swiss bank called the Banque Fiduciaire de Lucerne ("BFL") (Tr. 422-32, 438-441; GX 80).** At the end of the ten days, with no L/C's having been issued, Fun Tyme's lawyer, Mark Parker, made numerous at-

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* The accuracy of Gardner's own claims to having made efforts to secure this financing is evaluated under Point I of this Brief, *infra*. But not even Gardner claimed to have contacted anyone about these L/C's prior to taking Fun Tyme's money on January 15.

** BFL's entire reported assets as of December 31, 1973 were between $300,000-$400,000, yet it would here be called upon to guarantee $500,000 L/C's (Tr. 430).

tempts to reach Gardner and finally succeeded (Tr. 1393). Gardner falsely told Parker that the L/C's not only had been issued but were already directly "on their way" to the tourist agencies (Tr. 1393). Parker asked for a letter confirming this to show to Fun Tyme's anxious creditors, and Gardner, on January 29, 1975, mailed a letter (GX 70) to Scott Grody, Fun Tyme's President, stating:

> "This is to confirm that the letters of credit as per the enclosed list * have been issued and placed in the mail to the various beneficiaries. I have informed Mark Parker of this by phone today."

No such letters had been (or ever were) issued, let alone placed in the mail (*e.g.*, Tr. 1242, 1395, 1399).

But on the basis of this misrepresentation, Fun Tyme assured their creditors that the L/C's were enroute (Tr. 1395) and even sent Gardner a letter of thanks for getting the L/C's (GX 113). When, at last, the tourist agencies began to complain that they still had not received the letters, Parker and Grody sought again to contact Gardner (Tr. 1242ff.). This now proved impossible. Messages left for Gardner went unreturned (Tr. 1244, 1395), and Braunig, who sometimes answered the phone, fended them off with various evasions (*e.g.*, Tr. 1246).

Finally, Fun Tyme sent Gardner a demand for its money back (GX 99), to which it received no response (Tr. 1255-56). When Grody repeated the demand over the phone, Braunig falsely claimed the money had been spent in trying to obtain the letters of credit and refused

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* This was a list of the twelve tourist agencies involved, their addresses, and the amounts of the L/C's to be sent to each.

any refund (Tr. 1256-57). Gardner himself remained unreachable, and no money was ever refunded (Tr. 1255-60).

F. The Myrtle Rupe fraud (Counts 9-12)*

The last of the "advance fee" schemes of which Gardner was convicted in this case, and perhaps his cruelest scheme, was defrauding a near-destitute 73-year-old widow, Myrtle Rupe, of her last $14,000. Gardner committed this scheme in collaboration with another swindler, James Lofland, who was convicted here (75 Cr. 769) of defrauding Mrs. Rupe, another elderly widow named Esther Armstrong, and several other victims, of over a half million dollars between 1972-75 through a variety of fraudulent schemes (Tr. 1589-91, 1724-25, 1950-71 and *passim*).

In early 1975, Lofland called Mrs. Rupe at her home in Oklahoma City (GX 109), and told her that Sy Guthrie had introduced him to a man named Michael Gardner, who was connected with a Swiss bank and who was going to get a $700,000 loan to complete the country club development ("Country Clubs of America") in which he had previously induced her to invest most of her estate (Tr. 1732-34). Lofland said, however, that to get the loan Gardner had to be paid an advance fee of $14,000, and he asked Mrs. Rupe to pay it. When she said that she was now out-of-money and would have to borrow it, he responded by giving her Gardner's phone number and telling her to call Gardner and "check

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* The Government's direct case with respect to the Myrtle Rupe fraud consisted mainly of the testimony of Myrtle Rupe (Tr. 1724-1971), Deborah Mendenez (Tr. 1328-65), Jack Gardner (Tr. 1558-76), Esther Armstrong (Tr. 1589-1641), Sara Giaimo (Tr. 1650-75), and the exhibits accompanying their testimony.

him out" for herself. (Tr. 1734-36). Rupe then called Gardner, who said he was representing a Swiss bank and that he was prepared not only to secure a commitment for a $700,000 loan to the country club but to fund it as well (Tr. 1737-38). He urged her to come to New York and sign the agreement (Tr. 1738).

Accordingly, against the advice of her banker, Mrs. Rupe borrowed against her home (her one remaining asset) and flew to New York on the afternoon of February 17 (Tr. 1738-40; GX 110). Lofland took her immediately to Gardner's Fifth Avenue office, where Gardner presented her with an agreement to sign (Tr. 1741-43). After some hesitation, Mrs. Rupe, the next day, signed the final agreement, which had been already signed by Gardner, who was occupied "downtown" [in federal court] (Tr. 1744-49, 2681-83). Rupe then made out a $14,000 check to "S. Michael Gardner" (GX 301)," gave it to Braunig (who had charge of the office in Gardner's absence), and flew back to Oklahoma (Tr. 1749-50). Although Lofland had assured her that the money would be "held" in a "special account" (Tr. 1754), in fact, it was deposited into the "S. M. Gardner" account at Manufacturers Hanover, from where the proceeds were immediately spent on Gardner's back bills (including the fees of the attorneys then representing him in federal court) and payments to the Hotel Blackstone for the benefit of Guthrie. (Tr. 1667 ff; GX 204).*

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* The records of the S. M. Gardner account at Manufacturers Hanover GX 204; as summarized in GX 435 and 437 for identification show that, of the proceeds of the Fun Tyme and Rupe advance fees, Gardner spent 75% on personal expenses and expenses wholly unrelated to raising financing for these two projects, 23½% on payments to the Hotel Blackstone for the benefit of Guthrie, and 1½% on items that might arguably be said to relate to Fun Tyme or Rupe. Moreover, Gardner's overall bank records show he had virtually no other income during January-February.

[Footnote continued on following page]

The final agreement (GX 300) contained representations by Gardner (who entered into it in the name of his favorite front, Ekalb Investments, Inc.) that were utterly fraudulent.* But having now taken Mrs. Rupe's $14,000 and spent it, Gardner became typically difficult to reach and, when reached, engaged in lulling or delaying tactics (Tr. 1759-79, 1788-96).

Ultimately, Mrs. Rupe reported the matter to the F.B.I., who interviewed Gardner on April 4. After the

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1975, except from these two frauds and the proceeds of the earlier forged checks fraud. Loflar, meantime, realized $8,000 from the same scheme by getting t.. other victims to advance $8,000 toward the very same "advance fee" already paid in full by Mrs. Rupe (Tr. 1593--1618; GX 152-54, 289-91, 300).

* For example, the first clause provides that "EKALB agrees to arrange for COUNTRY CLUBS a stand-by committment [sic] in the amount of $700,000. . . ." This was equally impossible for Gardner, who was broke, as for Ekalb, which was a "shell" without assets. No such commitment ever was produced, nor was any evidence whatever introduced (other than Gardner's vague, uncorroborated testimony—see below) that any efforts were made to obtain such a commitment.

The next clause provides that "EKALB shall produce a letter of intent relative to this committment within three (3) business days of the signing of this agreement. The committment papers themselves will then be drafted in the normal course of business. . . ." Again, this "letter of intent" was never produced, and it borders on the absurd to believe that Gardner could have produced any legitimate letter of intent relative to such a substantial commitment within such a short period.

Similar misrepresentations can be found in most of the remaining paragraphs of the agreement. Perhaps the most blatant occurs in the penultimate paragraph (paragraph 13): "EKALB hereby represents that it can fund the committment discussed herein within (15) fifteen days of receipt of notice requesting this additional service." Given that the total assets in the various Ekalb bank accounts was in toto less than $500 and that Gardner, less than two weeks later, filed an Annual Information Return for Ekalb with the Ontario Government in which he stated that Ekalb was not in operation at all (GX 402B), this was quite a misrepresentation indeed.

agents had left, Gardner called Rupe, and the conversation, which was tape-recorded by both parties, was played for the jury at trial (GX 112, the transcript of which is GX 112B for identification). In this conversation, Gardner took a variety of tacks, including that Mrs. Rupe had defrauded him ("That's robbing from a lender, Ma'am. You're perpetuating a fraud upon us.") and, two minutes later, that Lofland had defrauded them both ("He takes all you nice ladies for money—and you're going to get mad at me? We'll see who goes for this one.") He also threatened her with various forms of retaliation for reporting him to the F.B.I.*

But most of all, he claimed to have obtained the promised commitment, two days after their agreement was signed, and to have it right on his desk, so that Mrs. Rupe was not entitled to her money back.** This was a flagrant

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* ". . . Madam you're going to have the problem of your life because I am going to take from you whatever you might have left. . . ."

* * * * *

". . . Ma'am, am I going to get you."

* * * * *

"Myrtle, . . . I would prepare myself for a libel suit that's going to knock your head off."

* * * * *

"And you're going to have a libel suit against you that's going to knock your head off."

** "Well, who's going to pay me —for the commitment that I got on my desk."

* * * * *

"I have the commitment here, dated two days after our agreement was signed."

* * * * *

"Sy has [the commitment], dear. Sy's at the life insurance company this very day."

* * * * *

"Now I have a commitment drawn by a major life insurance company. Okay? Payable to anybody whoever, a negotiable commitment."

* * * * *

"I've spent twice what you gave on this bunch of two bit creeps."

lie. At trial, Gardner never produced any such commitment, any evidence of it, or any evidence of any expenditures in connection with it. Indeed, he could not even name the "major life insurance company" that had allegedly given it, any more than he could name it to Mrs. Rupe. At last, under cross-examination, he admitted he never had the commitment at all. (Tr. 3082-86).

Gardner's Case

Gardner's case consisted of three witnesses, two of whom—Patrick Carr, who represented BFL in relation to Fun Tyme *after* the critical events of January, 1975,* and Morton Berger, who represented Gardner when he was sued by Barclay's—were very brief. The other witness was Gardner himself, who was on the stand for five full days (approximately two-thirds of which was direct and re-direct testimony). The jury thus had ample opportunity to assess his credibility as well as the legitimacy and credibility of his various defenses and claims of "good faith," many of which he reasserts in his brief to this Court.

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* Carr also admitted, among other things, that BFL from the start expressed concern over collateral, and that the only L/C's ever prepared by BFL were guarantees of $200,000, not $500,000, based on dollar-for-dollar collateral. (Tr. 2264-68, 2275-76).

ARGUMENT

POINT I

The Evidence of Gardner's Guilt on Each Count Was Ample.

As the foregoing Statement of Facts indicates, the Government's case was overwhelming, and Gardner's defense rested almost exclusively on his own assertions of good faith as he set them forth during his five days of testimony.* This was a jury question,** and the jury quite clearly rejected his defense. Indeed, given Gardner's performance on stand (*e.g.*, at one point he admitted to having been willing to testify to "anything" to escape a $600 civil judgment, Tr. 2856A), it is hard to see how anyone could credit his claims.

Nonetheless, Gardner devotes approximately two-thirds of his brief to this Court (App. Br. 3-29) to realleging tightened-up versions of some of the claims that he made from the stand, and, on this basis, arguing that the Government's proof was insufficient on each and every count. No allegation, argument, or inference is put forward that was not put before the jury at trial, and rejected by them. No defense is averred that does not rest here, as it did at trial, on an assessment of Gardner's credibility. Under these circumstances, and given the

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* See *Knickerbocker Merchandising Co.* v. *United States*, 13 F.2d 544, 546-47 (2d Cir., L. Hand, *C.J.*), *cert. denied*, 273 U.S. 729 (1926) (the "natural place to look" in assessing a good faith defense to commercial fraud is the defendant's testimony on the stand).

** *United States* v. *Armantrout*, 411 F.2d 60, 66 (2d Cir. 1969) ("exclusive function of the jury"); *Sparrow* v. *United States*, 402 F.2d 826, 828 (10th Cir. 1968); *Hawley* v. *United States*, 133 F.2d 966, 970 (10th Cir. 1943) (citing cases from the 4th, 5th, 7th, 8th and 10th Circuits).

settled rule that on appeal the evidence should be viewed in the light most favorable to the Government * with full weight accorded to "the right of the jury to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact",** including any adverse inferences drawn from a rejection of a defendant's testimony,*** Gardner's claims of insufficiency are totally frivolous.

Accordingly, it seems unprofitable to reexamine as to each and every allegation Gardner now makes the conflicting evidence and inferences already thrashed out in the parties' summations to the jury. However, a brief word seems in order as to Gardner's chief claim on each of the Counts.

Counts 1-4 (the White Holdings and Porklean Farms frauds). Gardner's argument here, as set forth in Point I of his brief, is that "If, as the Government claimed, Gardner obtained the advance fees simply to pocket and never complete the projects, and if as the Government not only claimed but proved, Gardner was penurious, why did he spend substantial sums and with Kirby do substantial work on the matters?" (App. Br. 16). Quite aside from the factual inaccuracy of its principal clause, the question is irrelevant: Gardner clearly induced White and Allen to give him money, not on the representation that, although bankrupt and needing to spend their money immediately on his own back bills, he would nonetheless try his best for

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* *Glasser* v. *United States*, 315 U.S. 60 (1942).

** *United States* v. *Greenberg*, 534 F.2d 523, 524 (2d Cir. 1976, *per curiam*), citing *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 822 (1974).

*** *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

them, but rather on the wholly false representations that he was a successful and experienced expert in raising capital through European stock offerings and that he would use their money, together with at least $25,000 of his own, to cover the start-up expenses of European stock offerings that would be carried out that very Spring. As Judge Sobeloff of the Fourth Circuit so clearly put the matter in affirming the mail fraud conviction in *United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963):

> "[N]o amount of honest belief that his corporate enterprise would eventually succeed can excuse the willful misrepresentations by which the investors' funds were obtained. An investor may be defrauded if his reliance is induced by deliberately false statements of fact, and the defendant's optimism as to the future is no defense." *

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* *Accord, e.g., United States* v. *Farago*, 283 F.2d 772 (2d Cir. 1960, *per curiam*); *United States* v. *Tellier*, 255 F.2d 441, 449 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958); *Greenhill* v. *United States*, 298 F.2d 405, 411 (5th Cir.), *cert. denied*, 371 U.S. 830 (1962); *Desver* v. *United States*, 155 F.2d 740, 744 (D.C. Cir.), *cert. denied*, 329 U.S. 766 (1946); *Hawley* v. *United States*, 133 F.2d 966, 970 (10th Cir. 1943).

Indeed, this Circuit, per Judge Learned Hand, has gone so far as to say that even full performance by a defendant is no excuse for taking a man's money by fraudulent deception:

> "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the [mail fraud] statute is directed."

United States v. *Rowe*, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932). Here, of course, neither White nor Allen received *anything* in return for the "fully refundable" advance fees that Gardner took, spent on himself, and never refunded.

Thus, any time or money Gardner allegedly spent in carrying out the projects was, at best, evidence offered in support of his claim of "good faith," which the jury was free to accept or reject.*

Counts 5 and 6 (the Barclays Bank forged checks fraud). Gardner (App. Br. 28-29) attacks the sufficiency of the evidence of the next counts, involving Gardner's defrauding of Barclay's Bank with two fraudulen. Metro Trust checks that he himself forged, by asserting: "It is not credible that Gardner would deposit a forged foreign check in a well known international bank which does not credit the account until funds have arrived." Once again, this claim is factually inaccurate and legally irrelevant: what is or is not "credible" is surely the prov-

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* Moreover, it is just not true that Gardner spent either substantial time or money in trying to carry out his end of the White and Allen projects. As already set forth in the Statement of Facts, the few steps that arguably were taken in furtherance of these ventures, such as the preparation of the brochure and, dubiously, Kirby's trip to Europe (which, however, the jury could readily have viewed as just a fraudulent frolic), were the work of White's own executives or of Kirby and were paid for, not out of the monies advanced to Gardner for this purpose, but from further funds elicited directly from White and Allen. The only ostensible exception to this—Gardner's setting up of the two corporations, Ekalb and Niagara Falls—turns out upon inspection not to be an exception at all: as noted earlier, Gardner never used these shells in furtherance of the ventures (even though Kirby repeatedly asked him to send the corporate papers to Europe so that he could register them for the offerings), but rather used them as "fronts" in commiting his other fraudulent schemes. Indicative, too, of the poverty of Gardner's claim here is his attempt (App. Br. 20, fn.) to cite to this Court as evidence of his expenses "budgets" (GX 29 and 30) which he characterized at trial as "nonsense" (Tr. 2962).

ince of the jury, especially where, as here, it relates to the question of intent.*

Counts 7 and 8 (the Fun Tyme fraud). With respect to the Fun Tyme advance fee scheme, Gardner, in Point II of his Brief, again attempts to elevate what is at best a jury argument about good faith into an appellate claim of legal insufficiency, by the extraordinary device of arguing that the belated, dubious, and unsuccessful efforts of others to provide the financing promised by Gardner must not only be credited to Gardner but must be taken to conclusively refute any notion that his own blatant misrepresentations were motivated by fraudulent intent.

In support of this argument, Gardner spends all but one sentence of his Point II describing the alleged efforts of Ivanoff, Vigevani, and Carr to secure financing for Fun Tyme in February and March, 1975. Aside from the fact that there is no evidence whatever that Gardner was more than very tangentially involved in any of these alleged efforts (whose very legitimacy was disputed by the Government's witnesses), their timing renders the whole argument irrelevant. What Fun Tyme desperately needed, and what Gardner expressly promised to supply, was *$500,000* in L/C's in *10 days* from *January 15*. Gardner had not the slightest basis for believing he could obtain any L/C's in that time; he took, and spent, the advance fee, and only then began making inquiries.

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* Furthermore, the claim is factually inaccurate because Barclay's did not in fact "not credit the account until funds have arrived." This was what they were *supposed* to do, but, as Gardner knew from the two mis-creditings that Barclays had committed on his behalf in just the four months prior to the forged check fraud, they rather frequently failed to adhere to their rules. In the case of the forged checks, Gardner and Braunig were able to induce a similar error.

Moreover, on January 29, four days after the last date by which he had promised the L/C's, and with Fun Tyme being pressed by its creditors, Gardner flatly stated, first on the phone and then in writing for presentation to the creditors, that the L/C's "have been issued and placed in the mail to the various beneficiaries." And he and Braunig repeated this falsehood to Fun Tyme well into February (*e.g.*, Tr. 1246). This flagrant lie would have warranted conviction by the jury even if the later alleged efforts of the others, on which Gardner now dwells at such length, had actually produced the promised L/C's. As it was, nothing ever came of the later efforts but a proposal (much too late to do Fun Tyme any good) to give Fun Tyme the same $200,000 in L/C's that it could always have obtained from any local bank.

Counts 9-12 (the Myrtle Rupe fraud). When he turns to the Myrtle Rupe advance fee scheme, Gardner, at Point III of his brief, once again tries to direct attention from the paramount facts of Gardner's having obtained and kept money through the grossest kinds of misrepresentations by trying to focus instead on the (largely irrelevant) actions and intentions of others. The proof was overwhelming that Gardner had no basis at all for representing to Mrs. Rupe, in exchange for her last $14,000, that Ekalb could get her a fundable $700,000 commitment in a matter of days, let alone that Ekalb itself, if so requested, would fund it. And his later claim to Mrs. Rupe that he had in fact gotten such a commitment "two days" after she paid him her money was a total falsehood, designed to divert her from his fraud.

Gardner, as he did in his argument to the jury at trial, seeks to draw attention instead to the misrepresentations allegedly made to him by Mrs. Rupe. Once again, this argument is both legally irrelevant and factually in-

accurate. Assuming arguendo that Rupe made misrepresentations to Gardner (a not uncommon occurrence where desperate victims are concerned) this does not excuse his own blatantly fraudulent misrepresentations to her. As Judge Pierce, in line with settled law, charged the jury:

> "Likewise, since the devising of a scheme or artifice concerns a defendant's conduct and intent, should you find that, as charged, a scheme to defraud existed, it is no defense that the victims themselves may have made inaccurate representations or entered into agreements that they could not fulfill." (Tr. 34[illegible]).*

At most, then, the claim that Mrs. Rupe made misrepresentations to Gardner was, even if credited, simply a factor to be weighed by the jury in assessing whether Gardner's failure to perform was simply a "good faith" reaction to discovering these misrepresentations, itself a subsidiary issue.**

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* This charge, in fact, is taken virtually verbatim from Judge Weinfeld's much relied-upon charge in an advance fee case, *United States* v. *Della Rocca*, 72 Cr. 217 (SDNY 1972), *aff'd from the bench*, (2d Cir. 1972) (trial transcript at MP-123). The identical charge was also delivered by Judge Owen in Lofland's own trial, *United States* v. *Lofland*, 75 Cr. 769 (SDNY 1975), *aff'd from the bench*, (2d Cir. 1976), where, not surprisingly, part of Lofland's defense was that Gardner had defrauded him!

** Moreover, Gardner's statement to this Court of the "misrepresentations" allegedly made by Rupe reflects a most slipshod and inaccurate portrayal of the record. There was no credible evidence whatever that Mrs. Rupe made any intentional misrepresentations to Gardner. Her conversations with Gardner were almost exclusively devoted to his representations about the funding he was going to get for her (Tr. 1741ff). Such misrepresentations as were made, were to be found in the "package"

[Footnote continued on following page]

Count 13 (*the Charge Accounts fraud*). Gardner's final claim of insufficiency (App. Br. 13), is directed at the charge account schemes that Gardner committed with Braunig's help. Gardner claims that "The proof of repeated payments" into the accounts is "a complete answer" to the charge. On the contrary, the payments, virtually all falling into the early periods of the accounts, were a necessary element of the scheme's success. If Braunig had simply opened an account and then defaulted, she would never have been able to open her other accounts (both because she would receive a bad credit rating and because she would not have available the one account to use as a reference for the next, as she repeatedly did). Moreover, she would never have been able to establish the "good" (through fraudulently based) credit rating that enabled her to get increased credit limits for herself and her "husband" "S.M. Gardner." As shown by the account records, as soon as Braunig had gotten an account switched to "S.M. Gardner" and the credit sufficiently extended, the charges mounted rapidly and the payments quickly trickled down to nothing.

In any case, the argument about payments is like the argument about Gardner's alleged efforts to perform his contracts—no defense to having given fraudulent representations. The issuers of the credit card were entitled

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prepared by Lofland. Some of these misrepresentations (*e.g.* that the golf course was completed) were known as such to Gardner before he entered into the agreement with Rupe (since *e.g.*, Schedule A to Gardner's agreement called for him to provide $125,000 for the completion of the golf course); while the others (e.g., the plagiarizing of the Del Safari Club brochure) were not known to him, or anyone else but Lofland, until long after the events in question (because they first came to light in Lofland's own trial in late 1975). In either case, therefore, they could not have been the reason Gardner failed to perform his agreement with Mrs. Rupe.

to have honest statements of Braunig's and Gardner's true credit status, not fraudulent statements even if backed by a willingness to make payments. When, for whatever reason, the payments stopped, the companies, as a result of the representations, were left without the protection they thought they had.*

POINT II

The Barclays Bank Scheme Directly Depended on the Mails for its Execution.

In Point IV of his Brief, Gardner argues that the use of the mails in connection with his forged checks scheme (Counts 5 and 6) was not sufficiently related to the execution of the scheme to meet the requirements of *United*

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* Gardner also contends that "The Government, in addition failed to prove beyond a reasonable doubt that Gardner had directed or controlled the applications filed several years before by Braunig." The Government was not required to prove this, but only to prove that Gardner entered into the scheme and adopted it as his own, of which the proof was overwhelming, and included, among much else, Gardner's inability to get credit in his own name or by his own application, his immediate and extensive use of Braunig's credit cards the moment they were switched to the fictitious "S.M. Gardner" name, and his own false statements to the creditors to stave off repayment of the accounts, *e.g.*, in one letter (GX 205) submitted to Master Charge, he disclaimed certain charges for vouchers he attributed to Kirby, stating of Kirby (with whom he had been doing deals for years), "My acquaintanceship with him, happily, was short lived." In any case, the Government did indeed mount a considerable circumstantial case to show Gardner's participation in the scheme from the start, showing, for example, that, prior to Braunig's applying for any of these accounts, she had already entered into her relationship with Gardner, in which he directed her every move. It was this proof, necessary to establishing the required agency connection between Braunig and Gardner, that Gardner elsewhere claims was "prejudicial".

States v. *Maze*, 414 U.S. 395 (1974).* The doctrine of *Maze* has no applicability to Counts 5 and 6, for the proof was overwhelming that Gardner and Braunig, as expressly charged in the Indictment, knowingly took "advantage of the extended delay foreseeable in the use of the international mails by Barclay's Bank and its agents in the clearing and collection" of the forged checks to induce "Barclay's Bank to credit [Braunig's] account with the face amounts of said instruments and [to] withdraw these amounts from her account prior to the time that Barclay's Bank learned that these instruments were false and spurious" (Indictment at A-11). Far from being an incidental after-effect as in *Maze*, the use here of the international mails in the clearing of the checks, and the accompanying foreseeable delay, were the linchpin on which the entire scheme depended.

The act of forging the checks presented no problems for Gardner; the practical problem was how to translate forged checks into genuine proceeds. But, as indicated earlier, both he and Braunig had knowledge of the long delay that attended the use of the mails in clearing checks back to Canada. This delay gave Braunig and Gardner the breathing space they needed to try a less risky approach, less likely to draw attention, than trying to cash the checks at once.**

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* In *Maze*, a mail fraud prosecution where the defendant had paid for items with a stolen credit card, the Government relied for the mailing requirement on subsequent mailings of the credit card vouchers after the defendant departed with the proceeds of the fraud; the Supreme Court reversed, holding that these mailings were too incidental to the scheme to be taken as being in execution of it, as required by the statute (18 U.S.C. § 1341).

** Conversely, the risk of trying to cash the forged checks immediately was a risk they would have had to take unless they knew, as they so clearly did, that the fraudulence of the checks themselves would not be exposed for many days to come because of the clearing delay resulting from the use of the international mails.

The approach they chose was trying to induce some bank employee to wrongly credit the checks under one of the standard "automatic" rules: the "three day rule" and the "seven day rule" (see Statement of Facts, section D, *supra*). Accordingly, Braunig, dealing directly with various tellers at various Barclay's branches, made no attempt to cash the forged checks directly or immediately, but instead attempted to cash checks against the proceeds of the first forged check on the third, seventh and seventh-business day following deposit. The third time, using a $75 check, she was successful. The bank proceeded to credit the proceeds under the seven day rule, and, starting with the little check and working back up to large ones, Braunig proceeded to draw out the entire balance (except for ten dollars). Again, however, she took enough time to avoid arousing suspicion, secure in the knowledge that the Canadian checks would still be wending their ways through the mails. In short, there was powerful evidence here of the mail-delay being a conscious and, indeed, crucial, part of Gardner's and Braunig's scheme, giving them the necessary time both to induce the bank to erroneously credit the checks and to draw on them without creating suspicion.*

While there appears to be no Second Circuit case decided after *Maze* dealing with the question of conscious

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* Any doubt in this regard was eliminated by the further proof that, just one month later, Gardner and Braunig relied on the common knowledge of the slowness of the international mails in perpetrating their next scheme, the Fun Tyme fraud. Thus, when Scott Grody called to find out why the L/C's which Gardner claimed had been issued had not yet reached the tourist agencies, Braunig told him:

> ". . . that the letters of credit were in the *mail*, and she did explain to me that they are coming from a bank in Switzerland, and being *very well aware of the slowness in the postal system* down in the Caribbean islands, especially coming from Europe, it was understandable that there could be some *delay*." (Tr. 1246; emphasis supplied)

reliance on a mailing delay to execute (and to realize the fruits of) a fraudulent scheme,* and while, in light of the "concurrent sentence doctrine," it is not necessary for this Court to reach the issue here,** three Circuits that have recently considered the applicability of *Maze* to analogous situations, such as standard check-kiting frauds (where delay is also relied on, though perhaps not so consciously or with so direct knowledge of mailing practices as was evident here), have concluded that *Maze* does not bar prosecution. *United States* v. *Street*, 529 F.2d 226 (6th Cir. 1976); *United States* v. *Shepherd*, 511 F.2d 119, 120-22 (5th Cir. 1975); *United States* v. *Constant*, 501 F.2d 1284, 1290-91 (5th Cir. 1974), *cert. denied*, 420 U.S. 910 (1975); *United States* v. *Miles*, 498 F.2d 394 (8th Cir., *per curiam*), *cert. denied*, 419 U.S.

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* However, in those Second Circuit cases where a "*Maze*" question has arisen, this Court has held *Maze* to its limited applicability and has upheld prosecution under the mail fraud statute. *E.g.*, *United States* v. *Greenberg*, 534 F.2d 523, 524 (2d Cir. 1976; *per curiam*); *United States* v. *Marando*, 504 F.2d 126 (2d Cir.), *cert. denied*, 419 U.S. 1000 (1974); *United States* v. *Cohen*, 518 F.2d 727 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975). See also *United States* v. *Pollack*, 534 F.2d 964 (D.C. Cir. 1976, Lumbard, *C.J.*, sitting by designation).

** Since Gardner was sentenced to concurrent five-year terms on Counts 1 through 12 of the 13 Counts, affirmance on any of the five-year counts other than Counts 5 and 6 would render consideration of the *Maze* issue discretionary with this Court. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *United States* v. *Neville*, 516 F.2d 1302, 1307 n.6 (8th Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Keller*, 512 F.2d 182, 185 n.8 (3d Cir. 1975). However, it should be noted that the issue is not without importance to the administration of justice, inasmuch as the mail fraud statute appears to be the sole federal statute even arguably applicable to forged foreign check schemes, crimes which on their face would seem to call for federal prosecution. 18 U.S.C. § 2314, for example, does not apply to foreign (as opposed to interstate) transportation of forged (as opposed to stolen) instruments.

1021 (1974). See also Judge Pierce's written memorandum in this case (A-23-24), denying Gardner's "*Maze*" motion below.*

POINT III

The Proof of Gardner's Similar Acts and Prior Convictions Was Properly Admitted.

Commercial frauds are inevitably proven through circumstantial evidence, the careful re-creation of all the relevant facts and circumstances that expose the hollowness of the defendant's representations and the reality of his greed. At trial, Gardner sought to keep out most

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* For example, in *Street, supra*, the Sixth Circuit held that a standard check-kiting scheme fell within the mail fraud statute and was not barred by *Maze*, because: "*Essential to the success* of such a check kiting scheme is the *delay caused in the bank collection process through use of the mails.*" (529 F.2d at 228; emphasis supplied.) Likewise, in *Shepherd*, another check kiting case, the Fifth Circuit held that *Maze* did not bar prosecution of a scheme which "uniquely depended upon the check collection process," adding: "It was the *delay* that enabled Shepherd to receive the forced credit, and it was the *use of the mails* that caused the delay." (511 F.2d at 121-22; emphasis in original).

The only Circuit to seemingly take the opposite tack is the Seventh Circuit in *Strauss* v. *United States*, 516 F.2d 980 (7th Cir. 1975), on which Gardner here relies. But although there is dictum in *Strauss* in which the Court indicates that the particular mailings on which conviction there rested were "not sufficiently related to the purpose" of the particular check kiting scheme to meet the requirements laid down in *Maze* (516 F.2d at 984), the issue was never really joined, because the Government (perhaps influenced by the fact that Strauss had already served almost all of his 8-year sentence) conceded as much in its appellate brief (516 F.2d at 982 and 984). More essentially, the mailings in *Strauss*, unlike here and in the cases in the other cited circuits, all occurred *after* Strauss had pocketed the proceeds of his fraud (516 F.2d at 985); consequently, the delay attributable to them could hardly be claimed to be central to the execution of the scheme, as it was here.

of this proof through the hoary cry of "irrelevant." Now, on appeal, he mislabels it "similar act" evidence and declares it to have been "prejudicial." * As this Court has so often stated, however, "The balancing of relevance against prejudice is primarily for the trial judge; and, without a showing of abuse, his exercise of discretion will not be overturned." *United States* v. *Albergo*, — F.2d —, Dkt. No. 75-1279 (2d Cir., June 17, 1976), Slip op. at 4215.

In truth, only a small amount of genuine "similar act" evidence was introduced in this lengthy trial and it was accompanied by careful limiting instructions from the cautious District Court, who did not come close to abusing his discretion. As for Gardner's prior convictions, it was he who chose to have them come into evidence.

(a) The Evidence of Similar Acts.

As in most fraud cases, the chief issue was intent. Or, as Gardner's counsel stated in his opening:

> "The defense is Mr. Gardner had no criminal intent. . . . Was there any type of criminal intent involved in anything here? That is the ultimate question; that is the key question. . . . The question is the intent of Mr. Gardner. Is there any criminal intent?" (Tr. 77-78)

On this issue of intent, the Government, as it had announced it would well prior to trial, introduced two "similar acts" by Gardner. These acts—the Worldwide Securities scheme and the Canadian check-kiting scheme —were both bank frauds, and thus were particularly relevant to evaluating Gardner's intent with respect to the Barclay's bank fraud counts (Counts 5 and 6).

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* See this Court's rejection of a similar attempt at mislabeling in *United States* v. *Hinton*, — F.2d —, Dkt. No. 75-1402 (2d Cir., September 27, 1976), Slip op. at 5698 and 5707.

Briefly, the Government's proof of the Worldwide Securities fraud showed that in the Fall of 1972, or just shortly before the start of the events covered by the Indictment, Gardner and Braunig opened a corporate checking account at Underwriters Bank and Trust Company under the name "Worldwide Securities Ltd." (Tr. 1154-57; GX 86, 87). Gardner then undertook to develop a "relationship" with a young (and impressionable) bank officer, Neil Woods, meeting with him socially, picking him up in a chauffeured limousine, etc. (*e.g.*, 1168-69, 1545-46). Meantime, Gardner deposited into the account six out-of-state checks, totalling over $68,000 (Tr. 1171-72, GX 88, 90A-F). Gardner then prevailed upon Woods to permit him to start drawing against the as-yet-uncollected checks (Tr. 1160; GX 88). Ultimately, every one of the six checks "bounced." (GX 88, 90A-F). In the meantime, however, Gardner was able to withdraw $32,000, which he never repaid (Tr. 1163-67, 1179; GX 28).

The Government's proof of the Canadian check-kiting fraud showed that in March of 1976, two months after the filing of the Indictment in this case [while Gardner was in prison], Braunig journeyed to Canada with a set of detailed hand-written instructions from Gardner (GX 409). These instructions listed the names and locations of some thirteen banks, the names under which accounts were to be opened at each, the automatic clearing rules (*e.g.*, "15 day hold," "10 business day hold") that were in force at each different bank, a listing of the checks that were to be drawn on insufficient balances at certain banks, where these checks were to be deposited, and other such details—in short, a manual for committing a check "kite." Gardner also provided his passport, Master Charge and Bank Americard credit cards, letters from him to banks where he already had accounts, checks, checkbooks, and other paraphernalia. (GX 410, 411). Following the in-

structions, Braunig, over a matter of a few days, opened, with minimal balances, numerous bank accounts in Toronto and in Montreal, where she also reactivated several of Gardner's old accounts. She then deposited into each of the four Toronto banks four fraudulent $7,500 checks drawn on four different banks in Vancouver, for a total of $30,000 in deposits. Before these checks could "bounce", she deposited into eight Montreal banks, checks, totalling approximately $30,000, that were drawn on the Toronto accounts. Finally, she immediately began writing checks on the Montreal accounts to whomever would accept them in exchange for genuine goods and services. For example, she exchanged one such check for $3,000 in fully negotiable travelers checks. While trying to negotiate another such check in a Montreal bank, she was arrested with the aforementioned instructions and paraphernalia on her person. (GX 407-411; Tr. 1011-1065).*

The direct probative value of these two similar acts in assessing Gardner's intent in connection with the Barclay's Bank scheme is obvious. Their introduction into evidence, which occurred toward the middle of the Government's case and occupied about a half day's testimony altogether in a trial lasting more than four weeks, was accompanied at every point by careful limiting instructions from the Court, directing the jury to consider the evidence only, if at all, on the question of Gardner's intent (Tr. 496-7, 1010-11, 1153, 1177, 1543). This instruction was repeated in the Court's charge at the close of the case. (Tr. 3432-34, A-231-33). Moreover, even after Gardner had taken the stand and testified in his own defense, the cautious and scrupulous District Court prohibited the Government from cross-exam-

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* The day following Gardner's conviction in the instant case, Braunig pled guilty in Montreal to 18 counts of fraudulent check kiting.

ining Gardner about either of the similar acts (Tr. 2838-42). Lastly, the Government on summation barely mentioned the similar acts, and strictly in reference to intent.

Given this small amount of similar act proof, its high probative value, and the careful limitations with which the trial judge surrounded its presentation, it is frivolous for Gardner to contend here that Judge Pierce abused the "wide range of discretion" accorded him in admitting such evidence. *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, — U.S. — (1976). The law is well established in this Circuit that "Evidence of prior criminal acts is admissible unless offered *solely* to prove criminal character or disposition or the proffered evidence is of such a *highly* prejudicial nature as to *overwhelm* its probative value." *United States* v. *Magnano*, — F.2d —, Dkt. No. 76-1011 (2d Cir., Sept. 7, 1976), Slip op. at 5477 (emphasis supplied). *Accord*, *e.g. United States* v. *Santiago*, *supra*, 528 F.2d at 1134; *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). See also Rules 404(b) and 403 of the Federal Rules of Evidence.

In an attempt to buttress his argument about similar acts, Gardner, playing fast and loose with the record, tries to pin the label "similar act" on evidence that was actually introduced as part of the proof of the charges in the Indictment.* For example, he lists as similar act

* At trial, Gardner's experienced counsel recognized as much, and never requested a "similar act" instruction to the jury except on the occasion of the introduction of the two actual similar acts: Worldwide Securities and the Canadian check kite. Indeed, as to the introduction of some of the items referred to in Point V of Gardner's brief, Gardner's trial counsel did not object at all on any ground. Only on appeal, with the aid of newly-appointed counsel, does Gardner suddenly claim that these items constituted "similar acts."

proof (App. Br. 34), the fraud and attempted fraud that Gardner perpetrated through his "S.M. Gardner" and "Ekalb" accounts at Barclay's Bank. Far from being similar acts, these transactions are referred to, in one way or another, no less than three times in the Indictment itself.* Also, the transactions in these two accounts were a necessary element of the proof of the forged check scheme set out in Counts 5 and 6, for they established Gardner's and Braunig's prior knowledge of the lax and error-prone practices at Barclay's. Finally, the specific fraudulent transactions involving the S.M. Gardner account at Barclays (set up in a fictitious name) and the Ekalb account at Barclays (set up with the aid of a fictitious name: "S.M. Gardner, President"), were themselves additional charges under Count 13, the fictitious name count, which expressly charged the defrauding of "banks." **

Gardner's other claims as to what came in as "similar act" proof bear even less support in the record. Without exception, they are items (often extremely minor) that were introduced either as circumstantial proof of some aspect of the crimes charged in the Indictment or in response to issues raised by the defense.

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* For example, the Indictment charges that:

> "GARDNER and BRAUNIG, with the aid of their confederates, would open accounts in both individual and corporate names (such as the fictitious name S. M. Gardner and the fraudulent enterprise Ekalb Investments, Inc.) at . . . Barclay's Bank of New York . . . and gain access to [its] services and facilities, which they would use for the commission of frauds upon said institutions." (A-10-11).

** Barclay's was one of the "banks" therein referred to; and when the Government first introduced the evidence of the transactions involving these two Barclay's accounts, it expressly reminded the Court that the transactions were charged under Count 13 (Tr. 984-85).

(b) The Introduction of Gardner's Prior Convictions

Gardner was convicted in 1973 of conspiracy to manipulate stock through false and misleading statements, and in 1974 of knowingly receiving and concealing stolen securities. Gardner, in his own direct testimony, discussed these prior convictions at some length, and thus waived any objections he might have had to their earlier admission; in any case, their earlier admission came as a direct result of his own tactical decision.

Prior to the commencement of trial (see Tr. 25) the Government made a written offer of proof regarding a critical moment in the Porklean Farms fraud, when Allen first stopped payment on his second and third $5,000 advance fee checks to Gardner and then, a few days later, sent $5,000 to Kirby directly (see Section B of Statement of Facts, *supra.*) The Government noted that, if these events were introduced without more, it would appear that, rather than Gardner's failing to perform the Porklean project (as was the case), Allen had voluntarily terminated his agreement wth Gardner and, as the defense claimed, had turned to working just with Kirby. What had actually happened, as Allen was prepared to testify, was that in mid-March, Allen had heard from Joseph Fuger, and later had confirmed with Probation Officer Peter Cosmides, that Michael Gardner had two recent convictions, and was facing possibly imminent imprisonment; this led Allen to stop payment on his two outstanding checks to Gardner (Gardner having already cashed an earlier $5,000 check from Allen). But when he talked to Gardner about this, Gardner lied and said the convictions must belong to some other Michael Gardner (a common name). This fraudulent misrepresentation was accompanied by talk of Kirby's great progress in Europe and this was seemingly confirmed by Kirby himself, who called from Europe and urged Allen to

forward the next $5,000 of the advance fee. As a result of this combination of false statements emanating from both Gardner and Kirby, Allen released the next $5,000 of the advance fee.

In its offer of proof, the Government offered to minimize any prejudicial spillover from the introduction of this highly relevant testimony by instructing Allen to refer to Gardner's prior convictions as simply "negative information" without further elucidation. (See the Government's Offer of Proof, p. 3). Judge Pierce expressly ruled that such a restriction was unnecessary and, indeed, might be misleading to the jury, and that the Government could introduce the actual conversations (Tr. 133-134). In so ruling, Judge Pierce had the great weight of authority on his side. As this Court stated in *United States* v. *Eury*, 268 F.2d 517, 520 (2d Cir. 1959): "As we have so often held, evidence relevant to the proof of one crime is not incompetent because it discloses the commission of another." * Indeed, as Judge Weinstein and Professor Berger have observed (citing cases):

> "At times it may be quite impossible to prove the case without revealing other crimes. The court

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* See, *e.g.*, in addition to the Second Circuit decisions cited in *Eury*, *supra*, *United States* v. *Eliano*, 522 F.2d 201, 202 (2d Cir. 1975: *per curiam*) (defendant's prior state conviction introduced on Government's case to show motive and to corroborate testimony of Government witness); *United States* v. *Andreadis*, 366 F.2d 423, 433 (2d Cir. 1966) (defendant's prior convictions introduced on Government's direct case, in mail fraud prosecution, as proof of fraudulent representations by the defendants), *cert. denied*, 385 U.S. 1001 (1967); *United States* v. *Kahaner*, 317 F.2d 459, 471 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963); *United States* v. *Barrett*, 280 F.2d 889, 890 (2d Cir. 1960). See also, in other Circuits, *United States* v. *Miller*, 508 F.2d 444, 449 (7th Cir. 1974); *United States* v. *Martin*, 489 F.2d 674, 676 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974); *Welch* v. *United States*, 371 F.2d 287, 294 (10th Cir.), *cert. denied*, 385 U.S. 957 (1966).

> cannot fragmentize the event under inquiry.' If an understanding of the event in question, or if a description of the immediate circumstances, reveals other crimes than those charged, exclusion will lead to a highly artificial situation at the trial making understandable testimony unlikely." (2 Weinstein & Berger, *Weinstein's Evidence* ¶ 404 [08] at 404-45).

Notwithstanding this invitation to introduce the specific testimony regarding Gardner's prior convictions, the Government, in an excess of caution, voluntarily consented (Tr. 134) to the request of Gardner's counsel that Allen refer to Gardner's convictions on his direct testimony as simply "negative information," provided the defense did not take advantage of this concession to try on cross-examination to portray a false picture of these events to the jury. (See also p. 6 of the Government's Offer of Proof.)

Consequently, Allen limited his direct testimony accordingly (Tr. 175 ff.). On cross-examination, however, Gardner's counsel, in an apparent change of strategy,* proceeded to cross-examine Allen at great length about his failure to pay more than $5,000 of the $15,000 advance fee directly to Gardner, strongly suggesting that Allen had broken with Gardner in bad faith (*e.g.*, Tr. 306, 342, 356, 357-58, 371, 372) (whereas the truth was that he had stopped payment for a very good reason and, only when Gardner misled him further regarding

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* From his opening, Gardner's counsel had hinted that Gardner would take the stand. Allen's direct testimony was so powerful and incriminating that Gardner may well have recognized that his only possible defense would come from testifying himself; accordingly there was no longer any question that his convictions would come in sooner or later, and he could afford to pursue a line of attack that risked "opening the door" to their immediate introduction.

his convictions, had resumed contact). Midway through this cross-examination (Tr. 356), the Government expressly directed the attention of Gardner's counsel to the fact that if he continued down this road, the Government would have no alternative but to elicit from Allen the precise details of what he had been told, as well as what Gardner had told him, so as to make Allen's behavior explicable and not permit the jury to be misled. Fully forewarned, Gardner's counsel, in the very next breath, continued this same line of cross-examination, and, indeed, concluded his cross-examination of Allen on this very theme (Tr. 357-58, 371-72).

Under the circumstances, the Government, with the Court's full approval (Tr. 373 ff.), now had no choice but to elicit on redirect the full and actual conversations (Tr. 377). See *United States* v. *Canniff*, 521 F.2d 565, 570 (2d Cir.), *cert. denied*, — U.S. — (1975).* This was accompanied by careful limiting instructions from the Court (Tr. 375) that were repeated in its charge at the close of the case (Tr. 3406, A205).

Gardner's brief, without any mention of this sequence, makes the argument, based on defense exhibit MTL (a letter from Allen dated March 22, A-150, that the defense declined to ask Allen about at all, during his testimony) that Allen was never misled by Gardner's false denial of his prior convictions, or in any case his being misled was not "the prelude to any acts by Allen" (App. Br. 36), and hence the proof should not

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*See also *United States* v. *Finkelstein*, 526 F.2d 517, 527-28 (2d Cir. 1975); *Vause* v. *United States*, 53 F.2d 346, 352 (2d Cir.) *cert. denied*, 284 U.S. 661 (1931). Indeed, after the false impression created on cross-examination by the defense, the trial court was virtually obligated to admit the full conversation to "prevent limitation of evidence to warp the truth and confuse the jury." *United States* v. *Apuzzo*, 245 F.2d 416, 422 (2d Cir.), *cert. denied*, 355 U.S. 31 (1957).

have been admitted. Yet once again Gardner's argument is factually inaccurate and legally irrelevant. It is factually inaccurate, because Allen expressly testified that he relied on Gardner's false denial in going forward with the deal and sending the $5,000 to Kirby (*e.g.*, Tr. 377). Thus, at best, there was a credibility issue: one which the defense, citing the very defense exhibit in question, argued extensively on summation, but which the jury nonetheless rejected.

More importantly, Gardner's argument is legally irrelevant because the question for the jury (as they were instructed) was whether Gardner's false denial of his convictions was a deliberately fraudulent misrepresentation "reasonably calculated" to deceive persons of "ordinary prudence", not whether it succeeded in deceiving Allen, let alone whether he relied on it. *United States* v. *Regent Office Supply Company*, 421 F.2d 1174, 1181 (2d Cir., 1970); *United States* v. *Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

In any case, the entire issue became moot when Gardner testified in his own behalf.* By taking the stand, he fully opened himself to the introduction of his recent prior convictions by way of impeachment—there being no question that they would have been admitted for this purpose, pursuant to Rule 609(a), Federal Rules of Evidence. Rather, he brought them out on his direct testimony (Tr. 2292 ff.), in order to give an "explanation" of them that tended to minimize their significance. Under these circumstances, the law is clear that he fully waived any objection to their prior admission. *United States* v. *Vario*, 484 F.2d 1052, 1054-55 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974).

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* There is not the slightest suggestion anywhere in the record that Gardner would have chosen not to testify if his convictions had been excluded earlier. Assuming the prominence of this issue he doubtless would have made this fact known if he intended to avoid the claim of waiver.

POINT IV

The Testimony of Gardner's Wife Was Properly Excluded; The District Court Correctly Barred Gardner's Counsel From Referring On Summation To The Bill of Particulars and From Introducing Proof of Gardner's Acquittals; and Gardner, Not Guthrie, Was The Principal In Count Eleven.

In Point IV of his Brief, Gardner attacks a number of the District Court's rulings excluding various offers from the defense. Even if these rulings had been erroneous, they were on minor questions and would at most constitute harmless error. However, none of them was erroneous.

The first such ruling attacked by Gardner is the Court's decision to prohibit the testimony of Gardner's wife. At the outset of trial, the District Court issued the standard order for the exclusion from the courtroom of both Government and defense witnesses (Tr. 27). Gardner's wife, who was present from virtually the outset of the case, remained, listened to the testimony of the various Government witnesses and looked at the Government's exhibits, and, as the Court later noted, assisted the defense directly in the presence of the jury (Tr. 2287).

The Government finished its case; arguments were heard as to sufficiency; the defense finished its own first witness (Carr)—and still Mrs. Gardner remained in the Courtroom. Only then did Gardner's counsel move to call Mrs. Gardner as a witness. He made absolutely no showing that her testimony related to some new or unexpected point. On the contrary, his offer was "Her testimony would be that she would identify herself and

that she was in Europe on some of [Gardner's] business trips and saw some people there. (Tr. 2286).*

Under these circumstances, if the Court had not excluded Mrs. Gardner's testimony it would have made a total mockery of its exclusion order. In any case, the law is clear that exclusion under such circumstances is well within the trial court's discretion. *United States* v. *Kiliyan*, 456 F.2d 555, 559 561 (8th Cir. 1972) (testimony of defendant's wife excluded); *Nick* v. *United States*, 531 F.2d 936, 937 (8th Cir. 1976); *United States* v. *Calhoun*, 510 F.2d 861, 867-69 (7th Cir.), *cert. denied*, 421 U.S. 950 (1975).

Gardner next complains that, even though the Government was permitted to introduce evidence of Gardner's two prior convictions (see Point III, *supra*), Gardner was not permitted to introduce evidence of his prior acquittals. Specifically, when Gardner took the stand, he began his discussion of his first conviction by stating "I was acquitted of the other counts, but convicted of the conspiracy count . . ." (Tr. 2292). The Government, correctly anticipating that Gardner would then attempt to testify to his acquittals in other cases, moved at side bar to exclude such further testimony on the ground that, while the convictions had previously come in as proof of a specific fact at issue in the case (to wit, the misrepresentation to Allen), Gardner's acquittals were not evidence of any fact at issue in this case. In response, Gardner's counsel

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* The issue of Gardner's business trips and the people he met in Europe, far from being new, had been raised by the defense in both its opening and in its cross-examination of virtually every Government witness. Later Gardner himself testified about it at length. Moreover, the Government never contested that Gardner had gone to Europe or that he had met with various associates there: what it had contested was on what business he had gone and who paid for his trip, issues as to which there was no offer of proof regarding Mrs. Gardner's testimony.

offered as the sole relevance for the acquittals the fact that the jury should be made aware of the fact that Gardner was in the courthouse on the day the agreement with Mrs. Rupe was signed (Tr. 2293). As the Court pointed out, this fact could be brought out without reference to the acquittals,* and, moreover, the acquittals themselves would not in any way establish this fact. Gardner's counsel having failed to offer any relevant reason for the admission of the acquittals, the Court had no basis to admit them and therefore did not.

Next, Gardner complains that he was not permitted to refer on summation to the bill of particulars. At the end of the trial, Gardner's counsel offered as an *exhibit in evidence* the Government's bill of particulars (Tr. 3159). This novel offer was of course denied. He then joined the motion of his codefendant Guthrie to refer to the bill in summation (Tr. 3161) and to show it to the jury (Tr. 3206) on the ground, not that the Government had proven something outside the scope of the bill of particulars, but simply that (in some way never specified at the time of the offer) the Government had not proven every particular it had specified in the bill. It is elementary that "The bill of particulars is not evidence of itself," and that its sole function "is to enable the accused to prepare for trial and to prevent surprise." *United States* v. *Murray*, 297 F.2d 812, 819 (2d Cir.), *cert. denied*, 369 U.S. 828 (1962). Consequently, Gardner's claim is frivolous on its face.

Finally, in addition to these evidentiary points raised in Gardner's Point VI, mention should be made of his claim, made as part of the "Conclusion" section of his

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* Gardner, in fact, later testified to the fact that he was in the courthouse when the Rupe agreement was signed and throughout this period (Tr. 2681).

brief (App. Br. 45), that Count Eleven should be dismissed "because Gardner cannot aid and abet when Guthrie, the principal, was acquitted." Count Eleven was one of the four counts comprising the Myrtle Rupe scheme. The Government at all times contended that Gardner was the principal of this scheme, and that, if anyone was the aider and abettor, it was Guthrie. Gardner, while maintaining his innocence, likewise admitted that he was a principal in the transaction and that Guthrie was merely a "finder." Guthrie took a similar position. Accordingly, the claim that Gardner was convicted on this count as an aider and abettor is wholly without support in the record.*

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* Gardner's appellate counsel appears to have been led into making this erroneous claim by the fact that the specific interstate telephone call relied on as the jurisdictional basis for Count Eleven was a call between Guthrie and Myrtle Rupe (in which Guthrie told Rupe that Gardner was getting her financing). Of course, there is no requirement under the wire fraud statute that the jurisdictional use of the wires involve the principal defendant, or, indeed, any defendant at all. It need only be shown that it was a use of the wires that foreseeably followed in execution of the scheme, as this call clearly did. As Judge Learned Hand stated in rejecting a similar defense objection under the mail fraud statute, there is no requirement that a defendant personally deposit the jurisdictional matter in the mails or even authorize its deposit; rather "it is enough if he knows that in the execution of the scheme letters are likely to be mailed, and if in fact they are mailed." *United States* v. *Cohen*, 145 F.2d 82, 90 (2d Cir.), *cert. denied* 323 U.S. 799 (1944). *Accord, e.g., United States* v. *Perkal*, 530 F.2d 604, 606-07 (4th Cir., 1976), and cases there cited. And see *United States* v. *Kelner*, 534 F.2d 1020, 1023 (2d Cir. 1976).

POINT V

The District Court Did Not Abuse Its Discretion In Denying Gardner's Motion For A Competency Hearing and Examination.

Gardner, who evidenced throughout trial his comprehension of the charges against him and his ability to assist in his defense, not only by providing the very fullest assistance to his counsel but also by giving five days of lucid, pertinent, and clever (albeit fabricated) testimony, nonetheless argues, in his final point on appeal, that the District Court abused its discretion in denying his untimely, bad-faith motion for a competency hearing and examination. The claim is without merit.

Prior to trial, Gardner had resorted to one delaying tactic after another, none of which, however, had been successful.* On the morning of trial, Gardner himself produced a seven-page "Motion For Dismissal" (Court Ex. 1). Six pages were devoted to setting forth various claims for dismissing the indictment or adjourning the trial that Gardner had raised previously and that the Court had previously denied. But the motion also raised, for the first time in all the extensive period preceding trial, the allegation that Gardner was incompetent. No underlying specifics were alleged to support the conclusion of incompetency; and one may well wonder how

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* For example, following Braunig's jailing in Canada in connection with her and Gardner's check-kiting scheme (see Point III, *supra*), Gardner moved to adjourn his trial because of the absence of what he termed a "critical" defense witness. But when the Government responded by arranging to have a videotaped deposition taken of Ms. Braunig in Canada, with all counsel present and with a United States Magistrate from the Southern District of New York specially presiding, Gardner promptly withdrew his consent to the deposition.

pro se papers that on their face showed Gardner's full comprehension of the issues and demonstrated his considerable abilities to assist in his own defense could be said to provide a basis for an incompetency motion. Nonetheless, the motion asked that the trial be adjourned until a psychiatric examination could be made of Gardner's competency pursuant to 18 U.S.C. § 4244.

This was a rather obvious tactical ploy, and Judge Pierce saw through it:

> "THE COURT: I will not entertain such a motion at this time. It is untimely and absurd that the application would be made at this late stage. This matter began by an indictment filed in May of 1975.
>
> I have no quarrel with you, Mr. Fischer [Gardner's trial counsel]. I gather that you have been handed these papers at the last moment yourself and that, as Mr. Gardner's attorney, you have undertaken to present the application.
>
> The application will not even be entertained, given the Court's interpretation, from all that has occurred up to this point, that the defendant Gardner is perfectly competent to stand trial. There is no evidence whatsoever at any time heretofore that Mr. Gardner has not been competent to stand trial or to make his defense or to confer with counsel. It has been evident to the Court for months that Mr. Gardner has cooperated with his attorney in making scores of motions. . . . I do not believe that I am called upon to allow litigants to toy with the process, and that's what I consider this to be." (Tr. 7).

Thus, having found the motion to be untimely, without basis in fact, and made in bad faith—in short, the obvi-

ous delaying tactic it was—Judge Pierce denied it, and the trial proceeded.* Gardner, his ploy squelched, immediately began to show that he was very competent indeed, conferring with his counsel throughout the jury selection process.**

On the third day of trial, Gardner submitted three affidavits from various inmates at the Metropolitan Correctional Center and a letter from his wife (Court's Ex. 5A-5D). Aside from the fact that, as the Government pointed out at the time, Gardner's solicitation of these

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* On the morning of trial, in connection with submitting his claim of incompetency, Gardner, with some show, ripped up a document and flung it across counsel table (Tr. 5). But as soon as the Court denied his motion and the jury panel was brought in, he became orderly and remained so throughout trial, thus exposing this earlier incident for the sham it was. See *United States* v. *Marshall*, 458 F.2d 446, 450 (2d Cir. 1972) ("Under these circumstances, we cannot hold that the trial court abused its discretion in failing to regard appellant's disruptive conduct as providing 'reasonable cause' to believe he was incompetent.")

** At the end of this process, the Court, after examining Gardner's papers and reaffirming its finding that "there has not been a sufficient showing to convince me in the exercise of my discretion that there is 'reasonable cause to believe' that the defendant Gardner is incompetent to stand trial" (Tr. 44-45), added:

> "Separate and apart from the consideration of the standard I have just discussed, I have had a chance to observe during today's proceeding that Mr. Gardner has participated actively throughout the jury selection process, he has consulted actively with his attorney in the courtroom, has accompanied him on recesses to the witness room to discuss the selection of jurors, and has taken notes throughout the proceedings. In short, having observed Mr. Gardner's behavior and demeanor today, I find no reason to believe that he is incompetent to stand trial, that is, to understand what is going on and to assist in his own defense. On the contrary, there is every indication that he has today continued to participate in his defense as actively as he had during the various pretrial proceedings." (Tr. 45-46)

affidavits from his fellow inmates would seem of itself to be a mark of his competency, the affidavits, on their face, failed to provide the slightest basis for believing Gardner to be incompetent. At most, they showed him to be upset and depressed, hardly an unusual state of mind for a man facing trial.*

Days, indeed weeks, passed, without anything further about the matter, Gardner continuing to render active assistance to his case. Then, in the third week of trial, there was submitted to the Court a letter (A-40-41) from the M.C.C. staff psychologist, Thomas Caffrey, Ph.D., who had interviewed Gardner earlier that day. Mr. Caffrey's conclusion was:

> "I find no indications of organic impairment, deteriorative-type loss of functioning, or schizophrenic-like thought disorder. In my judgment, Mr. Gardner is experiencing a serious depressive-type reaction to a relatively sudden loss of a sense of himself as a valuable person." (A-41)

In English, this appears to say that as the Government's case came in and the evidence of Gardner's criminality (and likelihood of conviction) mounted, he had grown more depressed.**

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* One of the inmates, Wayne T. Eckhart, even noted that he had "become very friendly with Michael Gardner because he has been helping me with my case," thus hinting that Gardner had demonstrated his competency in more cases than his own.

** Although Mr. Caffrey was fully aware, as he stated at the outset of his letter, that "this report may have some bearing on [the Court's] decision about the possible need for a competency examination of Mr. Gardner," his recommendations (A-41) to the Court (which included Gardner's meeting soon again with Caffrey), did *not* include the recommendation that Gardner be given a competency examination or hearing. Indeed, his letter never so much as hinted that Gardner was unable to understand the proceedings or to assist in his defense.

At this point, the defense renewed its motion for a competency hearing (though not for an examination) (Tr. 1781). The District Court, after examining this letter and all the other Gardner submissions, once more reaffirmed its finding that there was no basis for a hearing or examination on the question of competency:

> "In making this determination, the Court distinguishes, as it has before, between the question of whether Mr. Gardner is suffering from depression and whether he is competent to stand trial as defined in the relevant statute. I have examined all the materials. I find that they would support a finding that Mr. Gardner is suffering from a depression of some degree, and perhaps a serious degree. I do not find anything contained in these letters and reports which creates in the Court's view a reasonable ground for believing that Mr. Gardner does not understand the nature of these proceedings or that he is unable to assist in his own defense.
>
> To this I would add that I have had a chance to observe Mr. Gardner throughout the course of this trial, which is now into its third week. I have noted that he has conferred with counsel consistently and regularly, daily, hourly, and he has assisted in locating documents which were relevant at different times to the testimony being given, and has shown every sign of understanding fully what is going on here, both in general terms and as to specific matters as they arise. It is difficult for me to envision a more apparent demonstration of understanding of proceedings than what I have observed from the time that this trial began, including the impanelling of the jury. Accordingly, his application for a competency hearing is denied." (Tr. 1781-82).

The accuracy of the Court's findings was demonstrated, conclusively, a few days later, when Gardner took the stand and, for five days, proceeded to establish his full comprehension of the proceedings and of the charges against him and to show considerable ability in assisting in his own defense. It is submitted that any fair reading of his nearly 900 pages of testimony (Tr. 2287-3159) provides decisive proof of the utter frivolousness of any pretension that he was incompetent.

In short, the District Court denied Gardner's motion for a competency hearing and examination on a number of grounds, any one of which was sufficient for the denial: to wit, that the motion was untimely, made in bad faith, without sufficient factual allegations to warrant a hearing or examination, contrary to the overwhelming direct evidence of Gardner's competency shown at the trial itself, and frivolous on its face. Each of these findings was, as the above examples from the record indicate, well warranted.

As this Court said in *United States* v. *Hall*, 523 F.2d 665, 667 (2d Cir. 1975):

> "The statute, 18 U.S.C. § 4244, . . . is designed to safeguard against proceeding with a criminal trial of an incompetent; it does not require that such an examination be ordered whenever one is requested. . . . [I]t would be a misuse of the statute to grant such motions 'so routinely that the statute amounted to no more than a provision for an automatic continuation on the defendant's request.' An examination is not to be granted *ex mero motu;* and an order for such an examination is not a perfunctory or ministerial act. Rather, the ordering of such an examination requires an exercise of judicial discretion to determine if there is 'reasonable cause to believe' that the defendant may be incompetent. [citations omitted].

> A factual showing of reasonable cause should support the motion for such an examination. It is within the trial court's discretion whether to take evidence on the issues of fact, if any, raised by the motion. . . . In the instant case, we hold that, upon the showing claimed to have been made by Hall's counsel in support of his request for a psychiatric examination on the third day of the trial, the district court did not abuse its discretion in denying the request. [citations omitted]. Moreover, as in *Mirra* v. *United States*, 379 F.2d 782, 787 (2d Cir.), *cert. denied*, 389 U.S. 1022 (1967) and *United States* v. *Marshall*, 458 F.2d 446, 450 (2d Cir. 1972), the correctness of the court's denial of the request for a § 4244 examination here is confirmed by the court's observation thereafter that Hall was able to understand the nature of the proceedings and to cooperate in the presentation of his defense." *

Accordingly, the District Court's findings were well within the appropriate legal standards, and no basis appears for disturbing them here.

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* In addition to the cases cited in *Hall*, see, especially, *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975; Coffin, *C.J.*) ("The court did not abuse its discretion in refusing to order a psychiatric examination of [the defendant], whose competence the trial judge had ample opportunity to assess during . . . this trial.") and *United States* v. *Hill*, 526 F.2d 1019, 1023 (10th Cir. 1975), *cert. denied*, — U.S. — (1976) ("The trial judge was acting within his range of discretion when he denied the motions for psychiatric examination on the ground of lack of good faith in making the motions").

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 714—017—196

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

EUGENE NEAL KAPLAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of October, 1976 he served a copy of the within BRIEF by placing the same in a properly postpaid franked envelope addressed:

DONALD E. NAWI, ESQ
2 PARK AVENUE
NEW YORK, N.Y. 10016

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Eugene Neal Kaplan
EUGENE NEAL KAPLAN

Sworn to before me this
12th day of oct. 1976

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500837
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977